APIRAMI SDN. BHD.

v.

TAMIL NESAN (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. 74 OF 1985]
20 JANUARY 1986

CIVIL PROCEDURE: *Companies - Winding up petition - Whether bona fide attempt - Res judicata - Abuse of process of Court to intervene.*

COMPANY LAW: *Winding up petition - Minority shareholders - Bona fides.*

The above petition was presented to the Court on 30 April 1985 by two minority shareholders of the company. Two orders were sought, firstly that the second and third respondents purchase the shares of the petitioners at a price to be fixed by an independent auditor. The alternative order sought was for the company to be wound up. Before the date set for hearing of the petition, the respondents wrote to the petitioners offering to buy the shares on the terms set out in the first order. The petitioners refused and proceeded to advertise the petition. The respondents then took out a motion in which they asked for the petition to be struck out and/or dismissed because of non-compliance with the rules and also because the issues for adjudication in the petition had been previously compromised and /or were *res judicata* by a consent order earlier made in K.L. High Court between the same parties. The petition and the motion were fixed for hearing on the 9 September 1985.

On the said date, Counsel for the petitioners obtained leave of the Court to withdraw the petition with liberty to file afresh. The petition was struck off with liberty to the petitioners to file afresh. No order was made as to the respondents' motion. Before the order of 9 September 1985 was perfected, the respondents took out the instant application, where they sought to have the order of 9 September 1985 discharged and for the Court to hear and give an order in terms of their motion on which no order had previously been made (hereinafter referred to as Enclosure 12). When the respondents' application came on for hearing on 16 October 1985 an adjournment was granted on the petitioners' request (see judgment for reasons). When the application came up again for disposal 3 months later, another adjournment was sought by the petitioners once again but for a different reason. That adjournment was refused and the Judge proceeded to hear Enclosure 12.

Held:

[1] It is well settled that an order pronounced by a Judge can always be withdrawn, altered or modified before it has been perfected - see *re Harrison's share under a Settlement* [1955] 1 Ch 260 which was cited with approval by Federal Court in *Seong Fatt Sawmills Sdn. Bhd. v. Dunlop Malaysia Industries Sdn. Bhd.* [1984] 1 CLJ (Rep) 326. The judge has control over the case until his order is perfected. Such control must be used according to his discretion exercised judicially.

[2] Taking all the relevant facts and circumstances into account, the petition was not a *bona fide* attempt to obtain the relief asked for in the petition but that its real objective was to achieve a collateral purpose which appears to be to cause embarrassment to some or all of the defendants.

[3] In all the circumstances the justice of the matter calls for a review of the order made on 9 September 1985. Since in this case there has been an abuse of the process of the Court, the Judges can and will intervene to stop it.

[4] The order of 9 September 1985 was discharged and the petition dismissed with costs.

[Petition dismissed with costs.]

Cases referred to:
Re Harrison's Share Under a Settlement [1955] 1 Ch 260
Seong Fatt Sawmills Sdn. Bhd. v. Dunlop Malaysia Industries Sdn. Bhd. [1984] 1 CLJ (Rep) 326
Re Bellador Silk Ltd. [1965] 1 All ER 667
Goldsmith v. Sperrings Ltd. [1972] 2 All ER 566

JUDGMENT

VC George J:

It is well settled that an order pronounced by a Judge can always be withdrawn, altered or modified before it has been perfected - see *re Harrison's share under a Settlement* [1995] 1 Ch 260 which was cited with approval by Federal Court in *Seong Fatt Sawmills Sdn. Bhd. v. Dunlop Malaysia Industries Sdn. Bhd.* [1984] 1 CLJ (Rep) 326 . The Judge has control over the case until his order is perfected. Such control must be used according to his discretion exercised judicially.

Companies Winding-Up Petition No. 74 of 1985 was filed and thereby presented to the Court on the 30 April 1985 by two minority shareholders of the company. They had a number of complaints about the manner in which the company was run and the first order they sought was for an order that the second and third respondents purchase the shares of the petitioners at a price to be fixed by an "independent auditor", alternatively that the company may be wound-up. The 9 September 1985 was allotted for hearing of petition. The petition was served. On or about the 6 August 1985 before the petition was advertised the respondents wrote to the petitioners offering to buy out the petitioners at a price to be decided by an independent valuer i.e. in terms of the first prayer of the petition. However the petitioners turned down the respondents' response to the petition and proceeded to have the fact of presentation of the petition advertised. The respondents then took out their motion encl. (10) which was fixed to be heard on the 9 September 1985 when the petition was to be called for disposal. By that motion the respondents asked for the petition to be struck out and/or dismissed for non-compliance with the rules and because the issues for adjudication in the petition had been previously compromised and/or were *res Judicata* because of or demonstrated by a consent order made in Kuala Lumpur High Court Civil Suit No. C 4306 of 1984 between the same parties on the 15 February 1985.

When the petition was called on for hearing on the 9 September 1985 and before encl. (10) was considered, Counsel for the petitioners sought and obtained the leave of the Court to withdraw the petition with liberty to file afresh. The petition was struck off with liberty to the petitioners to file afresh. No order was made on encl. (10). A few days later, on 17 September 1985 before the order was perfected the respondents took out their application Enclosure (12), the instant application, seeking to have that part of the order giving the petitioners liberty to present a fresh petition, discharged, and for the Court to hear and give an order in terms of encl. (10) on which no order had previously been made.

When the respondents' application came on for hearing on 16 October 1985 Counsel for the petitioners Encik W. Heng Tang revealed from the Bar that a fresh petition in fact had been filed on 30 September 1985. However, no affidavit in reply to the affidavit filed in support of the application had been filed. He asked for time to take full instructions on the respondents' application. The Court accommodated him and the hearing of the application Enclosure (12) was adjourned. Certain orders to maintain the *status quo* were made pending the disposal of the application Enclosure (12).

When the application came up again for disposal, although another 3 months had passed no affidavit in reply had been filed. On this occasion Encik C.G. Oh of Counsel appeared for the petitioners and on behalf of the petitioners he sought yet another adjournment of the hearing on the ground that there had been a change of solicitors and his firm had only recently taken over the conduct of the matter. He too wanted time to take full instructions. The respondents/ applicants by Counsel objected to the application for adjournment. In the circumstances of this matter, that the new solicitors had just taken over the matter was no ground for granting an adjournment. The application for yet another adjournment was refused and I proceeded to hear Enclosure (12).

In the face of what appears to be complete answers to the various complaints of the petitioners given by the fourth respondent on behalf of all the respondents in his affidavit filed herein and the contentions wherein not having been challenged and in the light of the fact that the respondents' offer to buy up the petitioners' shares in the terms that the petitioners have sought the order of the Court being turned down and in the absence of any explanation for so doing and in the face of their conduct in filing the Civil Suit No. C 4306 of 1984 and obtaining an *ex parte* interim injunction and then apparently on being challenged having it withdrawn and agreeing to pay damages for having had the injunction imposed and consenting to have the suit itself discontinued which was done in February 1985 following upon which in April 1985 having the present petition presented on the same or almost the same complaints set out in the discontinued action and eventually having advertised it withdrawing it upon the presentation of it being challenged followed by the presentation of yet another petition soon after, I am constrained to conclude that the petition is not a *bona fide* attempt to obtain the relief asked for in the petition but that its real objective was to achieve a collateral purpose which appears to be to cause embarrassment to some or all of the defendants. In *Re Bellador Silk Ltd.* [1965] 1 All ER 667 at 672 A to B, Plowman J said in respect of a petition to wind-up a company:

> ... A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgement, an abuse of the process of the Court, and it is primarily on that ground that I would dismiss this petition.

The principle was explained thus by Lord Denning in *Goldsmith v. Sperrings Ltd.* [1972] 2 All ER 566 at 574:

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The Judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

Sometimes abuse can be shown by the very steps being taken in the Courts. ..... Again, where a pamphlet contained two different passages, each defamatory of a man, and he brought two separate actions, one for each passage. He failed on the first. The second was stayed. Fry LJ saying: '... such successive actions ... would be an abuse of the process of the Court ...': see *MacDougall v. Knight* ...

The same principle is shown in many bankruptcy cases. It was well stated by Evershed M.R. delivering the judgment of this Court in *Re Majority:*

> ... The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the Court, and therefore, disqualified from invoking the powers of the Court by proceedings he has abused.

This same principle has been applied also in winding-up cases: see *In Re Bellador Silk Ltd.*

In all circumstances I am satisfied that the justice of the matter calls for a review of the order made herein on the 9 September 1985. And in doing so I have, as has been seen, come to the conclusion that the presentation of the petition is an abuse of the process of Court. Where there is an abuse of the process of the Court, the Judges can and will intervene to stop it as I do in this case.

The order of 9 September 1985 made herein is now called in and discharged and in lieu thereof it is ordered that the petition be and is hereby dismissed with costs.

Also found at [1986] 1 CLJ 493